1992

The State of Utah v. Denny Alvarez : Brief of Appellant

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Attorney for Appellee.
James C. Haskins; Paul Gotay; Attorneys for Appellant.

DOCKET NO. 920401 **IN THE UTAH COURT OF APPEALS**

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	BRIEF OF APPELLANT
vs.	:	
DENNY ALVAREZ,	:	Case No. 920401 - CA
	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

JAMES C. HASKINS
PAUL GOTAY
5085 South State Street
Murray, Utah 84107
Attorneys for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, vs. DENNY ALVAREZ, Defendant/Appellant.	BRIEF OF APPELLANT Case No. 920401 - CA Priority No. 2

JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2a-3 (1953 as amended).

STATEMENT OF THE ISSUES

Did the trial court commit prejudicial error by admitting evidence tending to prove other bad acts. The standard of review applied to errors in admission of evidence is the correction of error standard allowing no deference to the trial court. State v. Taylor, 818 P.2d 561, 568 (Utah App. 1991).

Was Defendant denied his right to effective assistance of counsel because attorney Remal failed to call a witness which could have bolstered Defendant's testimony while undermining the prosecution witness's credibility?

DETERMINATIVE RULES

Utah Rule of Evidence 401

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah Rule of Evidence 402

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Utah Rule of Evidence 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rule of Evidence 404(b)

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utah Rule of Evidence 602

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Utah Rule of Evidence 801(c)

The following definitions apply under this article:

. . . .

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

STATEMENT OF THE CASE

On September 7, 1991, Denny Alvarez was arrested for Armed Robbery in violation of Utah Code Ann. § 76-6-302 (1953 as amended). On November 14, 1991 this matter was heard in the Third Judicial District Court for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis presiding. The Defendant, Denny Alvarez, was convicted of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 and sentenced to a minimum term of five years imprisonment in the Utah State Prison and ordered to pay a fine of One Thousand Dollars. On January 21, 1992, the Defendant appealed his conviction to the Utah Supreme Court. Pursuant to its authority, the Utah Supreme Court transferred the Defendant's appeal to the Utah Court of Appeals.

STATEMENT OF THE FACTS

On September 7, 1991 Defendant, Denny Alvarez, entered the Smith's Food King store at 876 East 800 South, Salt Lake City, Utah and approached the customer service window where Vanessa Milton was working (R. 271). Defendant testified that he had been using drugs steadily for approximately a week and had hardly slept during that week; he also testified that he had used intravenous drugs, most recently just before entering Smith's (R. 264 & 273).

Ms Milton testified that Defendant stood at her customer service window with some money in one hand and told her to give

him "six fifties" (R. 185-186 & 197-199). When she did not comply with that request, she testified that he lifted his shirt to reveal the handle of either a knife or a gun in his waistband (R. 102-103). She also testified that Defendant reached towards the cash drawer, which was closed, and then left the store. (R. 103). Defendant testified that he was confused because of the combination of the lack of sleep and the use of drugs, but that he was simply trying to get 6 fifty-cent pieces for the 3 one-dollar bills he had in his hand (R. 273, 276 & 279). When it became clear that Ms. Milton was not going to give him the change, he left the store (R. 280 & 281). Defendant also testified that he never had any sort of weapon in the store, but that Ms. Milton may have seen him holding onto the too-large waistband of his pants in a manner which she mistook for a weapon handle (R. 276-278, 280). When confronted by police a short time after leaving the store, Defendant gave a false name because he knew he had violated his probation (R. 220-221).

Prior to the beginning of trial, Defendant made a Motion in limine to suppress any evidence of Defendant's having given a false name, pursuant to Rules 403 and 404(b) of the Utah Rules of Evidence; the court denied that motion, but limited the State's evidence to the fact that Defendant had given a false name, and did not allow any mention of Defendant's probation status.

At the end of the presentation of the State's case in chief, Defendant moved to dismiss for insufficiency of evidence or, in the alternative, to reduce the charge to Attempted Robbery, a

third degree felony, because Defendant neither used a dangerous weapon nor threatened the use of a dangerous weapon as is required as an element of Aggravated Robbery; those motions were denied by the trial court (R. 255-261).

SUMMARY OF THE ARGUMENT

The trial court allowed into evidence the testimony of Officer Scharman that Mr. Alvarez gave an incorrect name and date of birth at the time he was arrested for robbery. However, because Officer Scharman's testimony was not expert testimony, and was based upon what another officer's report says, the evidence should have been excluded as impermissible hearsay.

Moreover, the evidence going to Mr. Alvarez using a different name and date of birth does not qualify as admissible character evidence because it is not probative of any element of aggravated robbery.

Even if the evidence is relevant, its probative value was substantially outweighed by its prejudicial effect upon the defendant. The incorrect name and date of birth evidence came in without the benefit of Mr. Alvarez's explanation that he gave the wrong name to avoid arrest on a probation violation. The evidence was misleading to the jury, who could not hear Defendant's highly appropriate explanation for his behavior, and was therefore substantially prejudicial to the defendant.

Defense counsel failed to call as a witness the person who drove Mr. Alvarez to the Smith's that morning. That witness

could have bolstered Mr. Alvarez's testimony while undermining the prosecution witness's credibility. Attorney Remal's failure to call this witness was unreasonable under the circumstances and prejudicial to Mr. Alvarez's defense.

ARGUMENT

POINT I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE TENDING TO PROVE OTHER BAD ACTS.

At trial, Mr. Alvarez's attorney moved that the State's witnesses not be allowed to testify to any use Defendant may have made of an incorrect name or date of birth at the time he was arrested on the robbery charge being tried (R. 41 & 220). It was proffered that Mr. Alvarez's explanation for using a false name would be that he was on probation for a prior robbery and he wanted to avoid any problems with probation (R. 220-21). The trial court had previously ruled inadmissible any evidence going to Defendant's prior convictions or probation status (R. 33 & 220). Mr. Alvarez argued that any mention of the false name forced him to argue evidence that had been previously suppressed in his favor by the trial court (R. 221). The state argued that the evidence was admissible because it showed evidence of guilt and it undermined the stated defense that Mr. Alvarez was too high on drugs to think clearly (R. 222).

The trial court ruled the evidence admissible in that the evidence did not constitute a crime or wrong as envisioned by Utah Rule of Evidence 404b (R. 223) and that it was relevant with

a probative value outweighing the slight prejudicial effect (R. 222). The trial court further admonished the witness that no mention was to be made of probation status or prior record of Mr. Alvarez (R. 223). The witness, Officer Scharman, acknowledged that he understood the court (R. 225).

Officer Scharman testified in front of the jury that Mr. Alvarez gave him the name of Joseph Madrid at the time of arrest and a date of birth that was too young (R. 242). The evidence establishing that Mr. Alvarez was not Joseph Madrid was not based on the officer's direct knowledge, but rather was based on hearsay, that is, the officer read the information in another officer's report (R. 243-44). Objections to the hearsay nature of the testimony were overruled (R. 243-44). The hearsay was based on a comparative fingerprint study done between arrest prints and "known prints of the defendant" (R. 244).

Mr. Alvarez took the stand in his own behalf (R. 263 & ff). He explained that the encounter was a mistake. He was trying to get change in fifty-cent pieces from the service counter at Smith's (R. 271). He was too high to communicate (R. 273). He did pull his pants up but did not exhibit a knife (R. 277). He finally reached for his own money and left the store (R. 280). He never explained the name discrepancy but denied trying to rob Smith's (R. 283).

The prosecutor argued in closing that Mr. Alvarez gave a false name to officer Scharman (R. 322). In rebuttal, he again argued that Mr. Alvarez lied about his name and, therefore, was

lying about his intent that day (R. 341).

A. THE EVIDENCE CONCERNING THE FALSE NAME WAS NOT RELEVANT TO THE AGGRAVATED ROBBERY CHARGE AND WAS THEREFORE NOT ADMISSIBLE.

Utah Rule of Evidence 402 provides in part that "(e)vidence which is not relevant is not admissible." Utah Rule of Evidence 401 defines "relevant evidence" as:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Therefore, the proponent of any evidence objected to on relevance grounds has the burden to show that the offered evidence is relevant as defined above. State v. Gray, 717 P.2d 1313, 1316-17 (Utah 1986).

1. This evidence in its actual form at trial did not provide admissible evidence that Mr. Alvarez had given a wrong name or date of birth.

On direct examination, Officer Scharman testified to the false name and date of birth in this manner:

> Mr. Spikes: What name did he give you when you asked him his name?
>
> Officer Scharman: I believe it was Joseph Madrid, or something of that nature
>
> Q: And what date of birth did he give you?
>
> A: I don't recall exactly. I just recall that the date of birth, he was a juvenile age.

(R. 242). Mr. Alvarez did not testify as to his date of birth or the use of the name Joseph Madrid (see ruling of court R. 221).

The only evidence offered going to show that Mr. Alvarez gave false information other than the interchange above was in the form of hearsay evidence (R. 243-44). Officer Scharman testified he did not realize the name might be false until later on:

> Mr. Spikes: Did you have occasion to discover that the name he gave you was not, in fact, his true name?
>
> Officer Scharman: No, sir, I didn't, not until I was subpoenaed and pulled the case up and read some supplementary reports.

(R. 243; hearsay objection by Mr. Alvarez followed). The objection was overruled and the questioning continued:

> Mr. Spikes: How was it that you, in fact, found that there was at least some question concerning the name of Madrid that he gave you?
>
> Officer Scharman: From a follow up detective.
>
> **Q:** Do you know what process, what procedure was taken that would occur to determine that?
>
> **A:** There was a comparative fingerprint done from the print I took at the time of the arrest versus some known prints of the defendant.
>
> **Q:** Okay. Do you know the results of that comparison.

(R. 243-44; hearsay objection by Mr. Alvarez again overruled). Then the officer testified that the name and date of birth had been incorrect at the time of arrest (R. 244).

This second exchange between the prosecutor and his witness, which is the only evidence offered to show the information was false, is not admissible evidence.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

Utah Rule of Evidence 602. The witness is not competent to

testify to this information because he did not "have the opportunity . . . to perceive" the fingerprint analysis himself. State v. Eldredge, 773 p.2d 29, 33 (Utah 1989), cert. denied 493 U.S. 814 (1989). He was never qualified as an expert, nor was his testimony found to be the kind necessary for expert testimony. Therefore, he did not meet the expert exception to Rule 602.[1]

The fingerprint testimony was inadmissible hearsay (see Utah Rule of Evidence 802).

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Utah Rule of Evidence 801(c). The officer was testifying to what another officer's report says, not to what he himself observed. That second officer was not available at trial subject to cross-examination.[2] This evidence should not have been admitted by the trial court. Gray at 1316.

The evidence as offered at trial establishes that Mr. Alvarez probably gave the name of Joseph Madrid and perhaps gave a juvenile date of birth. No competent or admissible evidence was offered to show that these pieces of information were indeed false. Mr. Alvarez himself was never questioned on these

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[1] Rule 602 also provides that "(t)his rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."

[2] The testimony, in addition to violating rules of evidence, was also admitted in violation of Mr. Alvarez's right to confrontation of witnesses under the state and federal constitutions.

circumstances. The jury can certainly assume that Joseph Madrid was not the only name Mr. Alvarez was known to use. No inference about his date of birth can be drawn from these facts, however, since juveniles can be tried as adults. This does not lead to the inference that he told a lie about his name or date of birth.

The prosecutor proffered that the information was relevant because it showed evidence of guilt (probably meaning consciousness of guilt) and showed that Mr. Alvarez was not too high to think clearly. However, the evidence which was admissible is not probative of consciousness of guilt. His use of two names, which may both be valid, does not show that he was lying to the officer, making it more probable than not that he had a consciousness of guilt. His use of two names does not make it more probable or less probable that he was thinking clearly. The evidence is not probative of any fact of consequence to this charge. It is not relevant, and, therefore, should have been excluded. State v. Stephens, 667 P.2d 586, 588 (Utah 1983).

2. This evidence was impermissible character evidence.

Even if this Court finds that the evidence going to Mr. Alvarez using a different name or date of birth was sufficient to allow the jury to infer that he lied to the officer, either because hearsay and competence questions do not block all the information from being properly admitted or because even without the hearsay the jury could infer that he was lying, then the evidence must still pass muster as character evidence under Utah Rule of Evidence 404(b). This is so because false information is

a crime, but it is not a crime upon which this jury was required to deliberate. It is not relevant to this case.

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

Utah Rule of Evidence 404(b). Evidence tending to show that Mr. Alvarez was a liar or that he had some other form of character flaw is not admissible, unless that very evidence is relevant in that "it tends to prove some material fact to the crime charged." State v. Forsyth, 641 P.2d 1172, 1177 (Utah 1982).

Therefore, character evidence may

> be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b). The question once more is one of relevance as outlined above with the special problem that if this evidence is not especially probative of some material fact, it will be used by the jury to show a "general disposition of [the] defendant" to commit crimes and that is improper. State v. Featherson, 781 P.2d 424, 427 (Utah 1989).

In a proffer, the prosecutor stated that the false information evidence was evidence of guilt in the aggravated robbery. The fact that a person gives a false name to an arresting officer upon arrest for aggravated robbery is not probative of any element of the aggravated robbery. It is not evidence of guilt in the sense.

If the prosecutor meant that it was some evidence of consciousness of guilt going to prove the mens rea element, this

may be more on target. However, this case presents a special problem. The prosecutor might argue this evidence as tending to show consciousness of guilt, but Mr. Alvarez's argument is that he wanted to try to avoid problems because he was on probation for another robbery. It was stipulated by both counsel that this probation evidence should not be admissible. This is the most likely inference to be drawn from the false information evidence. However, the jury would never arrive at this inference, because it would be even more prejudicial and improper to let them know that Mr. Alvarez was already on probation for a robbery crime. The jury would most surely use this information to convict Mr. Alvarez for having committed this sort of crime before. Given all facts, the evidence is not probative of consciousness of guilt. It is only when the information goes to the jury in incomplete form as it did here that the evidence appears at all relevant.

The second reason proffered is that the evidence tends to rebut the defense that Defendant was too high to think clearly, an absence of mistake kind of theory. The evidence as presented, even in its full form including the hearsay, does not tend to prove clear or unclear thinking.

The false information evidence should have been excluded. It does not tend to prove any fact material to this charge. Instead, it functions as improper character evidence, influencing the jury to convict Mr. Alvarez because he may have lied to the officer on the collateral matter.

B. EVEN IF THE EVIDENCE WAS RELEVANT, IT WAS UNFAIRLY PREJUDICIAL TO MR. ALVAREZ'S CASE.

Utah Rule of Evidence 403 provides in part that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

If this Court finds that the evidence of the incorrect name and date of birth is relevant to the present case, it is only marginally probative. As outlined above, the critical evidence going to the incorrectness of the information Mr. Alvarez gave is hearsay and not admissible to prove that the information was indeed incorrect. Additionally, the interaction between the officer and Mr. Alvarez had more to do with Mr. Alvarez's probation status than his need to give a different name in the face of charges that he attempted to rob Smith's. That he gave incorrect information to the officer tells the jury little about his intent within the store.

However, this evidence is highly prejudicial in several respects. First, the incorrect name and date of birth evidence came in without the benefit of Mr. Alvarez's explanation that he gave the wrong name to avoid arrest on a probation violation. Even without an arrest for robbery, he was in violation of his probation because he was high. The evidence was, therefore, misleading to the jury who could not hear Defendant's highly appropriate explanation for his behavior. This allowed the jury to assume that he had no real explanation and, therefore, must have been lying about his name and his intent to rob the store.

Trial counsel could not cure this problem by allowing Mr. Alvarez to explain why he gave a wrong name. The fact of his probation could only cause more prejudice against him with the jury.

Second, the information is unfairly prejudicial to Mr. Alvarez in that it allows the jury to speculate on his intent within the store by referring to this action with the officer. The two events, while close in time, are not related. There is little evidence going to Mr. Alvarez's intent. The two versions of the events in the store are very similar in their details. What is different between the Smith's employee's version and Mr. Alvarez's version are the judgments about what his actions meant. This means that the jury probably looked to an allegation of false information to decide who to believe concerning events in the store. This confuses the real issue and is misleading and unfairly prejudicial.

Third, officer Scharman explained the fingerprint evidence in this way:

> [t]here was a comparative fingerprint done from the print I took at the time of the arrest versus some known prints of the defendant.

(R. 244). Few people have fingerprints on file with law enforcement agencies. A permissible inference for the jury to draw from this information ("known prints of the defendant") would be that he had been arrested before. However, this kind of testimony had already been excluded by stipulation (R. 225). Officer Scharman had been warned by the judge about making such statements and acknowledged that he understood (R. 225). This

information was extremely prejudicial to Mr. Alvarez and unfairly so, because it had been properly excluded by the trial court prior to the witness's testimony.

In weighing the evidence's relevance versus its prejudicial impact, the trial court made an error. The evidence was much less relevant in its trial testimony than as proffered by the prosecutor. It was also much more prejudicial in its admitted than proffered form. If given an opportunity to fairly weigh the evidence, the trial court would have come to a different conclusion. Utah Appellate courts have found error in similar situations.

In State v. Pacheco, 712 P.2d 192, 195 (Utah 1986), a statement made by the defendant when arrested for a burglary was found to be admitted at trial in error. In Pacheco, the defendant was stopped while driving a car matching a description given in a burglary investigation. He consented to a search, which yielded fruits of the burglary. When showed a ring taken from the car, he responded:

> I don't know about the ring. It may have been there from a previous burglary that I just got out of prison for.

Id. at 193. At trial, all but the portion of his statement concerning prison was admitted in the State's case-in-chief. The Utah Supreme Court found that this was prejudicial error, since the defendant offered no real explanation other than this statement for his possession of the ring. Id. at 195. It is important to note that this statement as admitted gives the false

impression that he was admitting to the ring being a recent burglary. The statement as a whole makes no such admission but is too prejudicial to put to the jury. Mr. Pacheco and Mr. Alvarez were put in the same predicament and faired just as badly in the trial.

In State v. DeAlo, 748 P.2d 194, 199 (Utah App. 1987), a conviction for possession of cocaine was reversed when drug ledgers of marginal probative value for the crime charged were introduced at trial to the unfair prejudice of the defendant. In State v. Featherson, 781 P.2d 424, 428 (Utah 1989), testimony of other lewd acts in proximity to the charged rape were found to be minimally probative on the issue of intent and highly prejudicial and, therefore, should have been excluded by the trial court.

In a similar manner, all evidence going to alleged false information given by Mr. Alvarez to Officer Scharman at the time of arrest should have been excluded by the trial court. The evidence was of minimal probative value and unfairly prejudicial to Mr. Alvarez's case.

C. THE ADMISSION OF THE FALSE INFORMATION EVIDENCE WAS PREJUDICIAL ERROR.

The standard of review applied to errors in admission of evidence is the correction of error standard allowing no deference to the trial court. State v. Taylor, 818 P.2d 561, 568 (Utah App. 1991). However, underlying the factual determinations under Rule 403 of probativeness and prejudice made by the court are given some deference warranting a reversal of the factual ruling by the appellate court only if "the trial court acted

unreasonably in striking the balance." Id. In the present case, the trial court made several errors of the law which this Court should reject.

The evidence was in part admitted in violation of Utah Rules of Evidence 602 and 801. This Court should find that, under the correction of error standard, Officer Scharman's testimony showing that the name and date of birth were in fact false should have been excluded as impermissible hearsay. The remaining false information evidence should have been excluded under Rules 401 and 402 as not relevant to the case. Even if the evidence is relevant, it was error for the trial court not to apply Rule 404(b) in its decision making. As a matter of law, 404(b) applies, and this bad act evidence would not be admissible under that rule.

If this Court still finds some relevance in the testimony and reaches the Rule 403 issue, the trial court's ruling, which normally would be given some deference, cannot be given that deference here. The incorrect rulings of law happened prior to the weighing of fact that the trial court was obliged to do under Rule 403. There is no way to determine how the admission of improper evidence affected the factual determinations inherent in that balancing. This Court should look at the appropriate evidence before it and conduct the Rule 403 balancing test on its own. Such a rebalancing will show that the trial court committed reversible error.

> [W]here evidence is shown to have supported only conjectural inferences which had little probative

> value, or where no evidence was adduced that showed that a fact had any causal connection with the crime charged, reversal may be appropriate on grounds that the improperly admitted evidence could only have served to confuse and mislead the jury or to prejudice the outcome of the case.

DeAlo at 199.

The error was prejudicial in this case, requiring reversal. Taylor at 568. The State has attempted to use this false information evidence to prove the intent element on the aggravated robbery charge. The State had three eyewitnesses testify to the crime itself. This was sufficient evidence for the jury to consider on the issue of intent (Mr. Alvarez is not saying that the evidence going to intent was sufficient to establish the requisite intent, only that the jury had all the information concerning the alleged crime it could possibly have). Mr. Alvarez's interaction with Officer Scharman offered nothing more for the jury on this issue. However, it did create a significant likelihood that the jury would convict Mr. Alvarez based on irrelevant matters.

Point II ATTORNEY LISA J. REMAL'S FAILURE TO CALL A CRUCIAL WITNESS DENIED MR. ALVAREZ THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Counsel for Mr. Alvarez, Lisa J. Remal, called the defendant, Mr. Alvarez, as the only witness for the defense. Defense counsel failed to call a crucial witness who could have bolstered Mr. Alvarez's testimony while undermining the prosecution witness's credibility. Attorney Remal's failure to call this witness was unreasonable under the circumstances and

prejudicial to Mr. Alvarez's defense.

A defendant's sixth amendment right to counsel has been interpreted to be "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441,1449 n. 14 (1970). In determining whether a defendant's sixth amendment right to counsel has been denied, the Utah Supreme Court uses the two part test set forth by the United States Supreme Court in Strickland v. Washington:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Templin, 805 P.2d 182, 186 (Utah 1990)(quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). In addressing the first part of the test and determining whether counsel's performance was deficient, an "objective standard of reasonableness" is used. Id. at 186, 104 S.Ct. at 2064. Regarding the second part of the test, whether the defendant was prejudiced thereby, it must be shown that there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 187, 104 S.Ct at 2068. In determining whether a reasonable probability of a different outcome exists, an appellate court must "consider the totality of the evidence, taking into account such factors as whether the errors affect the

entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record. Templin, 805 P.2d at 187.

The prosecution presented four witnesses during its case in chief, only one of which, Vanessa Milton, communicated with Mr. Alvarez during the alleged crime. Vanessa Milton testified that Mr. Alvarez demanded "six fifties," that is, that defendant was not trying to get 6 fifty-cent pieces for the 3 one-dollar bills he had in his hand. In presenting Mr. Alvarez's defense, attorney Remal presented only the defendant himself, who testified that his only purpose in going to Smith's that day was to get 6 fifty-cent pieces for the 3 one-dollar bills he had. Defense counsel failed to call as a witness, "Jesse" the person who drove Mr. Alvarez to Smiths on the morning of the alleged robbery (R. 271). "Jesse," in addition to driving Mr. Alvarez to Smith's, had, immediately prior to the alleged robbery, purchased some fifty-cent pieces from the defendant (R. 270-271). If attorney Remal had given him an opportunity to testify, he could have corroborated Mr. Alvarez's reason for going to Smith's, which was merely to get exchange his 3 one-dollar bills for 6 fifty-cent pieces. In that "Jesse" was "kind of like an uncle" (R. 186) to Mr. Alvarez and directly involved in the events leading up to and including the alleged robbery, attorney Remal should have called him to testify on Mr. Alvarez's behalf. Her failure to do so demonstrates that her representation fell below an objective standard of reasonableness and, therefore, the first

prong of the Strickland test has been met.

Further, the second prong of Strickland is satisfied. "Jesse" had an opportunity to observe Mr. Alvarez right up until the alleged robbery took place. Who better, other than Mr. Alvarez himself, could testify regarding the defendant's intent in going to Smith's that morning. His testimony was important because it could have bolstered Mr. Alvarez's testimony while undermining Vanessa Milton's credibility. Vanessa Milton's credibility is crucial because her testimony is the only direct evidence of Mr. Alvarez's guilt. Because "Jesse's" testimony would have affected the credibility of the only witness who gave direct evidence of Mr. Alvarez's guilt, the fact that he did not testify affects the entire evidentiary picture. The conviction, therefore, is not strongly supported by the record. Admittedly, it is hard to ascertain the exact effect this witness's testimony would have on the judgment thus rendered. However, there exists a reasonable probability that had this witness testified, the outcome of the trial would have been different. Because both prongs of the Strickland test have been met, Mr. Alvarez was denied his constitutional right to effective assistance of counsel and therefore, his case should be reversed and remanded for a new trial.

CONCLUSION

Based on the foregoing reasons, Defendant/Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial.

SUBMITTED this 31 day of August, 1992.

PAUL GOTAY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the 31 day of July, 1992, eight copies of the foregoing were delivered to the Utah Court of Appeals and four copies were delivered to:

R. PAUL VAN DAM
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Appellee

_____

DELIVERED by _____

this _____ day of July, 1992.

_____

ADDENDUM
(Relevant Portions of the Trial Transcript)

were no- -

MS. REMAL: Your Honor, I'd object to Mr. Spikes' testifying.

THE COURT: Well, I think he's forming a hypothetical. Let him finish the question, and then if you have an objection you can make it. Mr. Spikes.

Q (BY MR. SPIKES) The question, or hypothetical, would be if you were to be told that it was, in fact, fingerprinted, and that no usable fingerprints were, in fact, lifted, I would ask you if that would be unusual in your experience?

MS. REMAL: Your Honor, I would object. I think this is asking for speculation. There's also no foundation upon which the witness can base his answer.

THE COURT: Well I'm going to sustain the objection on foundational grounds.

Q (BY MR. SPIKES) You indicated that you placed Mr. Alvarez under arrest at that point.

A Yes.

Q Did you have any conversation with Mr. Alvarez? Did you attempt to identify him?

A Yes, sir, I did. There was no ID on his person, and I did ask who he was, his date of birth and things of that nature.

Q Did it appear to you that he understood what you

were asking such that he could respond?

A Yes.

Q And did he, in fact, respond to those questions?

A Yes, sir, he did.

Q What name did he give you when you asked him his name?

A I believe it was Joseph Madrid, or something of that nature.

Q And what date of birth did he give you?

A I don't recall exactly. I just recall that the date of birth, he was a juvenile age.

Q So what action did you take upon receiving that information?

A Because of the nature of the crime, it's policy dictates for us officers, I took him to the police department where the SOCO unit photographed him and fingerprinted him.

Q Would you indicate what that is?

A There's officer's mobile crime labs and so forth there responsible for fingerprints and photographs and things of that nature.

Q Did you know what the ultimate process was?

A Just that we photographed him and fingerprinted him, I made contact with an uncle, and then I transported him to the detention center.

Q Do you know at what point it was determined that he, in fact, was not Mr. Madrid?

MS. REMAL: Your Honor, I'd object without some further foundation.

THE COURT: Will you lay some additional foundation, Mr. Spikes?

Q (BY MR. SPIKES) Did you have occasion to discover that the name that he gave you was not, in fact, his true name?

A No, sir, I didn't, not until I was subpoenaed and pulled the case up and read some supplementary reports.

Q And what information did you gather during, or through that process?

A That the information given to me was not- -

MS. REMAL: Your Honor, it sounds like this is based on hearsay, and I'd object unless there's some other foundation for the answer.

THE COURT: Well he can give his understanding of the information, if he knows. I'll have you rephrase the question, Mr. Spikes.

Q (BY MR. SPIKES) How was it that you, in fact, found that there was at least some question concerning the name of Madrid that he gave you?

A From a follow-up detective.

Q Do you know what process, what procedure was

taken that would occur to determine that?

A There was a comparative fingerprint done from the print I took at the time of the arrest versus some known prints of the defendant.

Q Okay. Do you know the results of that comparison?

MS. REMAL: Your Honor, again I'd object, this is hearsay.

THE COURT: Overruled, you may answer.

THE WITNESS: Just I read in the supplementary record that the individual I arrested versus the print of the other individual were in fact the same.

Q (BY MR. SPIKES) And with respect to the juvenile status, based on the date of birth of the individual that you arrested, did you discover additional information?

A That he was an adult, is all.

Q Did you gather any other evidence from Mr. Alvarez at the time that you booked him under the name of Mr. Madrid?

A The knife and the money is what was placed in evidence.

THE COURT: Lean into the microphone, please, and repeat your answer.

THE WITNESS: The knife that was taken out of the

ADDENDUM
(Relevant Portions of the Trial Transcript)

were no- -

MS. REMAL: Your Honor, I'd object to Mr. Spikes' testifying.

THE COURT: Well, I think he's forming a hypothetical. Let him finish the question, and then if you have an objection you can make it. Mr. Spikes.

Q (BY MR. SPIKES) The question, or hypothetical, would be if you were to be told that it was, in fact, fingerprinted, and that no usable fingerprints were, in fact, lifted, I would ask you if that would be unusual in your experience?

MS. REMAL: Your Honor, I would object. I think this is asking for speculation. There's also no foundation upon which the witness can base his answer.

THE COURT: Well I'm going to sustain the objection on foundational grounds.

Q (BY MR. SPIKES) You indicated that you placed Mr. Alvarez under arrest at that point.

A Yes.

Q Did you have any conversation with Mr. Alvarez? Did you attempt to identify him?

A Yes, sir, I did. There was no ID on his person, and I did ask who he was, his date of birth and things of that nature.

Q Did it appear to you that he understood what you

were asking such that he could respond?

A Yes.

Q And did he, in fact, respond to those questions?

A Yes, sir, he did.

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